Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

No. 90-757

In The

Supreme Court of the United States

October Term, 1990

CHISOM, et al.,

Petitioners,

v.

ROEMER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS, ROEMER, ET AL.

RONALD A. ZUMBRUN
*ANTHONY T. CASO
DEBORAH J. MARTIN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

IDENTITY AND INTERESTS OF AMICUS 2

OPINION BELOW 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. VOTING RIGHTS ACT § 2(B) IMPLEMENTED A "RESULTS TEST" WHICH APPLIES ONLY TO "REPRESENTATIVES" AND JUDGES ARE NOT "REPRESENTATIVES" 5

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group 5

B. The Judiciary Performs an Antimajoritarian Role 7

C. Federal Rules Have Provided Great Protection Against Any Possibility of Bias 9

II. THE IMPACT OF EXPANDING VOTING RIGHTS ACT § 2(B) TO JUDICIAL ELECTIONS WOULD BE DEVASTATING TO THE MANY STATES THAT ELECT JUDGES ON A DISTRICT-WIDE BASIS 11

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

CASES

Alexander v. Martin, 86-0148-CIV-5 (E.D. N.C. 1987) 12

AlHakim v. State of Florida, 88-14165-CIV-T-10"A" (M.D. Fla. 1988) 12

Betar v. DeHavilland Aircraft of Canada, Ltd., 603 F.2d 30 (7th Cir. 1979), cert. denied, 444 U.S. 1098, reh'g denied, 445 U.S. 947 (1980) 10

Brooks v. Glynn County, Georgia, Board of Elections, 1989 WL 180759 (S.D. Ga. 1989) 12

League of United Latin American Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) 3

Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) 12

Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) 12

Pease v. Peck, 59 U.S. (18 How.) 595 (1856) 10

Rome v. United States of America, 446 U.S. 156 (1980) 3

Southern Christian Leadership Conference of Alabama v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1988) 12

Thornburg v. Gingles, 478 U.S. 30 (1986) 14

Williams v. State Board of Elections, 696 F. Supp. 1563 (N.D. Ill. 1988) 12

STATUTES

28 U.S.C. § 1441 10

28 U.S.C.A. § 1441, historical note 10

TABLE OF AUTHORITIES CITED — Continued

Page

42 U.S.C. § 1973(2) 3

RULES

Supreme Court Rule 37 1

MISCELLANEOUS

Montesquieu, Spirit of Laws, Vol. 1 (1750) 8

Shapiro, Introduction: Judicial Selection and the Design of Clumsy Institutions, 61 S. Cal. L. Rev. 1555 (1988) 9

The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961) 8

No. 80 (A. Hamilton) 10

No. 81 (A. Hamilton) 10

Weber, "The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective," 73 Judicature 85 (1989) 11

No. 90-757

In The

Supreme Court of the United States

October Term, 1990

CHISOM, et al.,

Petitioners,

v.

ROEMER, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS, ROEMER, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of respondents, Roemer, *et al.* Written consent to the filing of this brief has been granted by counsel for both parties to this action. Copies of the letters of consent have been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF AMICUS

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, the Fifth Circuit Court of Appeals has held that Section 2(b) of the Voting Rights Act does not apply to judicial elections. The petitioners would have the judicial election scheme at issue here, which is without discriminatory purpose, trigger the broad remedial powers of the court in possibly dismantling a judicial election system that has served Louisiana for over a century, thereby subjecting a state's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

PLF's public policy perspective and litigation experience in the Voting Rights Act arena will provide an

additional viewpoint with respect to the issues presented. PLF participated in an earlier Voting Rights Act case before this Court, *Rome v. United States of America*, 446 U.S. 156 (1980) (a Section 5 case dealing with municipal annexations), and is submitting an amicus brief in *League of United Latin American Citizens v. Mattox* concurrent with this brief. PLF believes the Fifth Circuit correctly analyzed the holdings of this Court and lower courts in its decision that excluded judges from the term "representatives."

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Chisom v. Roemer*, 917 F.2d 187 (5th Cir. 1990). The court, in a per curiam opinion, remanded the case (which concerns the at-large election of Louisiana Supreme Court justices) to the District Court with instructions to dismiss all claims under the Voting Rights Act in light of its previous opinion in *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990).

SUMMARY OF ARGUMENT

The stated goal of Section 2 of the Voting Rights Act is to prevent racial discrimination at the polls so that minorities can "elect *representatives* of their choice."[1] The

[1] 42 U.S.C. § 1973(2).

term "representatives," as used in Section 2, should be limited to state officials who make law, and not extended to those who interpret it. The Louisiana Supreme Court is the authoritative source of state law, including the state constitution. Supreme Court justices do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently, and impartially for all. States have never drawn judicial districts so as to recognize the special interests of any group of citizens in the community.

The application of Section 2 to judicial elections has the potential for a tremendous impact on many states' electoral systems. Remedial measures resulting from such application may force the invalidation of judicial electoral systems. Such invalidation substitutes federal judicial judgment for that of the citizens as to what their form of government should be. By doing so, federal courts will overstep the boundaries mandated by federalism. Congress did not extend Section 2 to *all* electoral practices and systems but only to the election of *representatives* from multimember districts.

Elections for representatives in which vote dilution has been shown can be cured by redistricting under the one-man, one-vote principle. In the case of elections for representatives, such a cure does not destroy the function of the office, invalidate the system, or infringe other constitutional rights or guarantees. On the other hand, these evils may well come to pass as a result of redistricting in the judicial election context.

ARGUMENT

I

VOTING RIGHTS ACT § 2(B) IMPLEMENTED A "RESULTS TEST" WHICH APPLIES ONLY TO "REPRESENTATIVES" AND JUDGES ARE NOT "REPRESENTATIVES"

If this Court reverses the Fifth Circuit decision, applies Section 2, and orders remedial action to the effect of subdividing the state Supreme Court district into, essentially, a "white" district and a "black" district, this Court would dramatically alter an elected Supreme Court justice's independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, he would be rendered beholden to a small portion of those appearing before the court. Rather than applying the law impartially, he may be pressured to permit some state of affairs to continue, or to halt some other occurrence, if he intends to remain in office.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

Louisiana is divided into six districts from which the seven members of the Louisiana Supreme Court are elected. Each district elects one justice except the district composed of the four parishes which encompass the New Orleans metropolitan area. That district elects two justices. An elector with a case before the Louisiana Supreme Court will present his arguments to five or six judges with whom he has no connection whatsoever

Depending on the Supreme Court district in which he lives, he will have had the opportunity to vote for one or two of the justices on the panel. The lack of connection between the litigant and the justices is the linchpin of impartial justice. The American judicial system relies on citizens to voluntarily abide by court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Although petitioners seek subdistricting to improve judges' responsiveness to minorities, creating the subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups in the district do not suffer vote dilution. However, Supreme Court judges do not decide cases in the same manner as representative legislators. Each judge acts according to his own interpretation of the law, not necessarily that of the members of his district, in applying the law to the case at hand.

Subdistricting robs judges of their independence by focusing a very narrow public opinion over their decision-making process. Do petitioners really want judges responsive to public opinion in their districts? Public

opinion is an uncertain and constantly shifting barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by special interest perspectives and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

The Framers of the Constitution intended legislative representatives and judges to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. United States Constitution Articles I and III. Further, the difference between legislative representatives, who service the special interests of their constituents, and judges, who do not, is accentuated by the Framers' recital of the duties and prohibitions of the respective offices. The executive and legislative branches are subject to an elaborate system of rules while the judiciary is not. The plain meaning of the word "representative" cannot be strained to encompass judges, who simply do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free

from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be non-representative, but Hamilton asserted that " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

> "It is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the . . . Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body." *Id.* at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. It is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority or special interest will. Their decisions often must enforce constitutional guarantees in the face of special interest opposition. To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents.

> "Few of us would want an electorate that thought there were no differences at all between judging and political activity. To erode the perception of this distinction is dangerous; it risks result-oriented adjudication independent of any satisfactory rule structure . . . . The continuing perception of an institution of electing or removing judges may over time weaken the idea that adjudication ordinarily is sharply different from doing politics."[2]

A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

C. Federal Rules Have Provided Great Protection Against Any Possibility of Bias

Federal courts have addressed the issue of bias in other contexts. The judiciary certainly has not turned a blind eye to the existence of possible bias in its own branch of government. Yet as much as the judiciary combats bias in its ranks, courts have carefully drawn their opinions to stay within the limits of the Constitution and statutes under which challenges are brought. The creation of diversity jurisdiction and the ability of defendants to

---

[2] Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. Cal. L. Rev. 1555, 1559 (1988).

remove cases to federal court are based on the concern that local litigants could benefit from a hearing before a local judge. The Federalist Papers Nos. 80 and 81 emphasize this point: "[J]udicial authority of the Union ought to extend to . . . cases . . . in which the State tribunals cannot be supposed to be impartial and unbiased." The Federalist No. 80, at 475 (A. Hamilton). This is necessary because "the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of natural causes." The Federalist No. 81, at 486 (A. Hamilton).

The historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of the different states has its foundation in the supposition that possibly the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C.A. § 1441, historical note. All of the provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate

biases; the subdistricting of judicial election districts is a swing in the wrong direction.

No right exists for litigants to vote on the particular judges who may hear their cases. As it is now, citizens before the Louisiana Supreme Court cannot challenge the five or six judges whom the litigant had no opportunity to elect simply because of that lack of opportunity. Neither should the litigant be able to challenge the justices elected from the First Supreme Court District by forcing the division of that district.

II

THE IMPACT OF EXPANDING VOTING RIGHTS ACT § 2(B) TO JUDICIAL ELECTIONS WOULD BE DEVASTATING TO THE MANY STATES THAT ELECT JUDGES ON A DISTRICT-WIDE BASIS

Judicial elections are unique compared to elections for legislative and administrative offices. Judicial elections are distinguished by lower levels of turnout, less competition, and greater reliance by the voters on factors such as incumbency, previous judicial experience, and party affiliation in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 Judicature 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and administrative offices.

Although Supreme Court justices act as a collegial body and therefore are distinguishable from trial judges,

even within that collegial body judges do not serve the same functions or reach decisions in the same way as legislators or other "representatives" of constituencies with special interests. Rather, Supreme Court justices serve the powerful state function of administering fair and efficient justice. In that regard their function, like the function of trial judges, is nonlegislative, and at-large nonproportional districting is appropriate to the nature of the office.

Minorities have already challenged state judicial election systems in Georgia, Illinois, Alabama, North Carolina, Ohio, Mississippi, and Florida[3] in addition to the Texas and Louisiana cases currently before this Court. Each state that elects judges has its own method of doing so, be it by at-large elections, by district, or some other method. California elects Supreme Court justices on an at-large basis. If Section 2 is applied to judicial elections in Texas and Louisiana, the trend would undoubtedly spread to California. Consider the implications if each region of California is designated a justice. The result of splitting up the state into districts would result in smaller, more homogenous constituencies, *e.g.*, the San Francisco District, the Orange County District, and the Los Angeles District (which would be forced to have two

[3] *Brooks v. Glynn County, Georgia, Board of Elections*, 1989 WL 180759 (S.D. Ga. 1989); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1988); *Alexander v. Martin*, 86-0148-CIV-5 (E.D. N.C. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); and *AlHakim v. State of Florida*, 88-14165-CIV-T-10"A" (M.D. Fla. 1988).

justices, requiring the split of Los Angeles into perhaps Eastern and Western Districts). These districts would intolerably exacerbate political pressures on judges. Moreover, California Supreme Court "representative" justices may become beholden to certain interests in geographic areas of the state. For example, as the northern and southern regions of the state litigate over water rights, "northern" and "southern" justices would feel compelled to decide cases so as to benefit their constituency if they intended to retain their post.

Louisiana made a conscious choice over a hundred years ago to elect Supreme Court justices from districts, and to allow the largest metropolitan area to remain one district even though it elects two justices. Delegates from all regions of Louisiana, assembled at the 1973 Louisiana Constitutional Convention, reaffirmed that choice. *Chisom v. Roemer*, Brief of Defendants-Appellees, United States Court of Appeals for the Fifth Circuit, No. 89-3654, at 5-7. Remedial measures imposed by federal courts to cure a Section 2 violation may totally rework the state system to such an extent that state citizens no longer even recognize the system their elected state representatives established. In a case where no intentional discrimination exists, a federal court should not dramatically alter a state system. Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violates the principles of federalism.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the petitioners here seem to believe that only a member of a minority group will be responsive to the interests of that group. If this Court determines that state judicial elections are subject to Section 2, and if single-member or smaller multimember judicial districts, some with majority black populations, are created as a remedy, then state court judges will be held accountable, as "representatives," to a smaller, more ethnically and racially homogenous population.

Requiring judges to be "representatives" insults not only the judges who sit on the state and federal benches, but the entire electorate. To hold, in effect, that a black litigant is more likely to receive a sympathetic ear from a black judge, who will not ignore minority interests, *Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns the integrity of both black and nonblack judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, the judges composing the entire judiciary of a state is far from homogenous in philosophy, political leanings, and view of the law and its application. Therefore, the exemption that Congress carved out of the Voting Rights Act for

judicial elections should be upheld, and the Fifth Circuit's opinion should be affirmed.

DATED: April, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
DEBORAH J. MARTIN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation